Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-298

JOHN NIX,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. _____

JOHN NIX,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

The petitioner, John Nix, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Tennessee entered in this proceeding on June 30, 1975, which denied a state writ of certiorari and approved the judgment and opinion of the Court of Criminal Appeals of Tennessee entered on March 18, 1975.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Tennessee, not yet reported, appears in Appendix A to this brief. The opinion of the Court of Criminal Appeals of Tennessee, not yet reported, appears in Appendix B to this brief.

JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on June 30, 1975, and this petition for writ of certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Was there a free and voluntary consent to search made by petitioner, in conformity with his rights under the Fourth Amendment and Fourteenth Amendment to the Constitution of the United States, where FBI agents refused to step outside Petitioner's apartment at Petitioner's request immediately prior to Petitioner signing a consent to search form?

2. Should the materials, i.e., money and marihuana, seized have been excluded as the fruit of an illegal arrest?

3. Should the money and marihuana seized and the statements made by the Petitioner have been excluded as the fruit of an interrogation which violated *Miranda v. Arizona*, 384 U.S. 436 (1966), in that the Petitioner was not advised that he had the right to appointed counsel if he could not afford one?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States provides as follows:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war, public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the Constitution of the United States provides as follows:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; not deny any person within his jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

On May 7, 1973, Indictment No. 7529 was returned by the Knox County Grand Jury charging petitioner with possession of marihuana with the intent to sell said marihuana —a felony. T.C.A. §52-1432(a)(1)(F). Petitioner filed a Motion to Suppress Evidence obtained as a result of a search of petitioner's apartment and seizure of the substance in the case. Prior to trial, a hearing was held

on said Motion and the trial court overruled the Motion. Petitioner was convicted and received the maximum sentence of one to five years imprisonment and a $3,000 fine.

On March 18, 1973, the Court of Criminal Appeals of Tennessee affirmed the judgment and petitioner petitioned for a writ of certiorari by the Supreme Court of Tennessee. The writ was denied on June 30, 1975.

STATEMENT OF FACTS

At the hearing for the Motion to Suppress Evidence, FBI Agent Phillips testified that he received information that a young white male driving a blue VW bus had exchanged a number of small denomination bills for larger currency at several local banks. As the Petitioner parked his bus on the University of Tennessee campus, three FBI agents approached Petitioner, identified themselves and advised Petitioner of all his *Miranda* rights except of the right to appointed counsel if he could not afford one. They asked him to sit in one of the FBI cars and, in talking to them, Petitioner said he had won the money gambling. The agents said they wanted to go to Petitioner's apartment to check the serial numbers on the money and Petitioner was asked if he had any contraband and Petitioner said he had some marihuana for his personal use.

Upon the agents' request that they go to Petitioner's apartment to look at the money, the Petitioner agreed. Petitioner's wife, who had been in the van with Petitioner, was dismissed in order that she may go to University classes and Petitioner drove his bus, accompanied by an FBI agent, to his apartment with two agents following in a car. The agents radioed their office to notify the Knoxville Police Department Narcotics Squad to meet them at the Petitioner's apartment.

When the agents and Petitioner reached the apartment, Agent Phillips read the Petitioner a consent-to-search form and asked him to sign it. Petitioner asked what would happen if he did not sign it and Agent Phillips stated that he would ask for a search warrant. At this time, the Petitioner asked the agents if they would step outside for a few minutes and when he was told they could not do so, he signed the consent form.

At the agents' request, Petitioner produced $9,290.00 in cash and some marihuana. At this time four Knoxville Police Department officers arrived and were shown the signed consent- to-search form. The Knoxville officers asked Petitioner if they could, likewise, search the apartment and Lieutenant Norman testified that the Petitioner agreed. During this search, eight one-pound bricks of marihuana were found.

Petitioner testified he was stopped by the FBI agents and was not advised of his *Miranda* rights until he was in the Knoxville Police Department car on the way to jail. Further, at his apartment, he told Agent Phillips that he was not going to sign the consent-to-search form, but Agent Phillips said they could get a search warrant simply by making a phone call. Petitioner requested the agents to step outside, but the agents laughed and said they could not do so and told Petitioner to sign the form. Petitioner testified he signed the form, feeling that he had no other choice, and that he did not make a consent to the search of the apartment by the Knoxville Police Department Officers.

A clinical psychologist testified as a witness and found the Petitioner to be passive, introverted and indecisive. Further, Petitioner would tend to give in easily in a crisis situation and was usually intimidated by authority figures.

The trial court found that the FBI agents did not arrest the Petitioner and that the Petitioner voluntarily consented to the search of his apartment and the Court of Criminal Appeals of Tennessee upheld these findings. (Appendix B).

REASONS FOR GRANTING THE WRIT

I.

THERE WAS NO VALID CONSENT TO SEARCH WHERE LAW ENFORCEMENT OFFICIALS OBTAINED PETITIONER'S SIGNATURE ON A CONSENT-TO-SEARCH FORM AFTER REFUSING TO LEAVE PETITIONER'S PREMISES AT PETITIONER'S REQUEST.

A basic tenet inherent in the Fourth Amendment to the Constitution of the United States which proscribes unreasonable seraches and seizures is that a person may waive or refuse to invoke his Fourth Amendment protections. However, the Fourth and Fourteenth Amendments require that a consent must be voluntary and not coerced. When there is a search without a warrant, as in the present case, and the State relies upon the consent of the accused to validate the search, the State carries a heavy burden requiring it to prove that there has been, in fact, a consent freely and voluntarily given. *Bumper v. North Carolina*, 391 U.S. 543, (1968). As stated in *Simmons v. Bomar*, 349 F.2d 365 (6th Cir. 1965):

> "Consent to a search, in order to be voluntary, must be unequivocal, specific and intelligently given, uncontaminated by any duress or coercion, and is not lightly to be inferred." *Id.*, at 366.

In order to determine whether or not an accused has freely and voluntarily consented to a warrantless search,

the United States Supreme Court has stated that "[v]oluntariness is a question of fact to be determined from all the circumstances . . ." *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-249, (1973). However, trial courts are not at liberty to find consent when the facts, taken in their light most favorable to the State, do not support the legal principles applied.

In the present case, the evidence produced by the prosecution showed that three FBI agents escorted Petitioner to his apartment and while in the apartment refused to go outside upon the request of the Petitioner. When the Petitioner "was told that he could not do so he signed the [consent] form." (Appendix B). Such a refusal by the agents is nothing but explicit, overt coercion.

> "But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion were applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. In the words of the classic admonition in Boyd v. United States, 116 U.S. 616, 635:
>
> > 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the

duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'"
Schneckloth, *supra*, at 228-229.

As stated in *Schneckloth*, proof that petitioner had knowledge of his right to refuse consent is not a necessary prerequisite to demonstrating a voluntary consent. However, in the present case, Petitioner's refusal, in the form of requesting the agents to leave, was effectively *denied* by the FBI agents. The agents' refusal to step outside at the request of Petitioner denied the Petitioner the option of refusing to sign the consent form. At the very least, Petitioner's actions show equivocation and his ultimate signing of the consent form was a result of necessity and not of his own volition. It is incongruous that a person would consent toa search for the very items which he knows he has in the apartment, i.e., Marihuana.

"Under the totality of the circumstances we do not believe that the State has met its heavy burden and shown that the defendant Vaughn intelligently consented to this search. The fact that the contraband was known by Vaughn to be in the trunk militates heavily against his validly consenting. See *Higgins v. United States*, 93 U.S. App. D.C. 340, 209 F.2d 819, 820. The very fact that Vaughn refused the trooper's request to search in the first instance is incongruous with validly consenting to the search. His hedging and delaying in producing the key conveys to us acquiescing to authority rather than clear positive words and actions denoting a valid consent. See *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed. 2d 797.

"Under these circumstances, we are satisfied that Vaughn's act of consenting was of necessity and not of

his volition." *Vaughn v. State*, 477 S.W.2d 260 (Tenn. Cr. App., 1971).

Therefore, the decision, in the present case, by the Court of Criminal Appeals of Tennessee, upheld by the Supreme Court of Tennessee, is a misapplication of the law regarding the determination of voluntary consent as pronounced by the Supreme Court of the United States and cannot be upheld. Equivocal conduct by the Petitioner cannot produce a valid consent and the actions of the FBI agents are the type against which the Fourth and Fourteenth Amendments are directed and against which we are warned in *Boyd*, *supra*.

The arrival of the four officers from the Knoxville Police Department and the claim of consent by Lieutenant Norman does not clear the primary taint of the FBI agents' actions. The intimidation of the Petitioner could not be less when there are seven officers in his apartment as opposed to three. To hold that his consent for the Knoxville Police officers to search was voluntary, when said "consent" was made while the three agents were already searching, flies in the face of reason. Analogous is *Evans v. United States*, 375 F.2d 355 (8th Cir. 1967), in which the court held that a second statement given by the defendant should be excluded in situations where the first statement given is found to be obtained in an illegal manner. It held that the first illegally obtained statement let the "cat out of the bag" and the "later confession always may be looked upon as fruit of the first." Likewise, with regard to the consent allegedly given to the Knoxville Police officers, no more harm could be done — the FBI agents were already searching.

II.

THE SEARCH AND SEIZURE OF THE MONEY AND MARIHAUNA WERE THE FRUITS OF AN ILLEGAL ARREST.

Evidence seized resulting from an illegal arrest must be suppressed under ***Wong Sun v. United States***, 371 U.S. 471 (1963). In the present case, the Petitioner was stopped by the FBI agents and, after questioning, was taken to his apartment. One agent remained with Petitioner during this trip. Petitioner's wife, in the words of the Court of Criminal Appeals was "dismissed" so she could go to classes. Agent Phillips stated that he did not put handcuffs on the Petitioner and that Petitioner was not under arrest. However, it does not take formal words of arrest or booking at a police station to complete an arrest. When the agents interrupted Petitioner and restricted his liberty, the arrest was complete. ***Henry v. United States***, 361 U.S. 98 (1959). Further, the arrest cannot be justified by evidence obtained after said arrest.

The trial court and Court of Criminal Appeals found that the FBI agents had probable cause to arrest Petitioner, but that they did not arrest him. The ***only*** information the agents had was that a person was changing small bills into larger denominations. Such actions are totally innocent and there is no way that such information could be probable cause for an arrest. The circumstances surrounding Petitioner's signing of the consent form evolved from the illegal arrest of Petitioner. The information which led the agents to Petitioner's apartment was a direct result of the illegal arrest of the Petitioner. ***Wong Sun v. United States***, ***supra***. It is submitted that the analysis of ***Wong Sun*** in ***Brown v. Illinois***, 43 U.S.L.W. 4937 (U.S. June 26, 1975), applies in the present case. By this analysis, the

exclusionary rule was applied in ***Wong Sun***, a case involving an illegal arrest, to protect Fourth Amendment rights.

The alleged consent and search of the apartment came during Petitioner's detention by the FBI agents. Further, it is obvious that the agents were "embarked" upon an "expedition for evidence in the hope that something might turn up." The very manner by which the Petitioner's signature was obtained on the consent form negates any claim that the taint of the arrest had been purged by an act of free will by Petitioner.

The statement by Petitioner that he had some money and Marihuana in his apartment, apparently, led the agents to said apartment. Although Petitioner submits that his statements were obtained in violation of ***Miranda v. Arizona***, 384 U.S. 436 (1966), it is submitted that said statement falls within the holdings of ***Wong Sun*** and ***Brown***.

III.

THE SEARCH AND SEIZURE OF THE MONEY AND MARIHUANA AND THE STATEMENT OBTAINED, REGARDING THE MONEY AND MARIHUANA, WERE THE FRUITS OF AN ILLEGAL INTERROGATION IN VIOLATION OF ***MIRANDA*** SINCE PETITIONER WAS NOT ADVISED OF HIS RIGHT TO APPOINTED COUNSEL.

The Court of Criminal Appeals of Tennessee remarked that Agent Phillips advised Petitioner of his ***Miranda*** rights except for the right to have a court-appointed lawyer if Petitioner could not afford one. However, the court held that only an indigent must be advised of the right to appointed counsel and that Petitioner was not indigent. During the interrogation, the FBI agents learned that there was money, possibly subject to seizure, and Marihuana at Petitioner's

apartment. This ruling is in apparent conflict with federal decisions on the matter.

In *Lathers v. United States*, 396 F.2d 524 (5th Cir. 1968), the defendant was convicted of transporting a stolen motor vehicle in interstate commerce. He made statements to both state and federal officers who failed to advise him of the right to appointed counsel prior to uttering a syllable. The court reversed the conviction because of this failure and did not concern itself with whether or not the defendant was actually indigent. In a similar case, the same court noted that the FBI agents went into an extensive explanation of the defendant's rights, even saying that the defendant could speak to an attorney or anyone else before saying anything. However, with regard to appointment of counsel, the FBI said that if the defendant were arrested, an attorney would be appointed to him. The court reversed the conviction and held that the defendant's statement should be suppressed since he was not advised of his right to appointed counsel prior to any questioning. The court did not refer in any manner to the question of defendant's indigency. *Windsor v. United States*, 389 F.2d 530 (5th Cir. 1968).

In the present case, the appellate court refers, in support of its ruling, to a footnote to the *Miranda* decision which states:

> "While a warning that the indigent may have counsel appointed need not be given to the person who is known to have an attorney or is known to have ample funds to secure one, the expedience of giving a warning is too simple and the rights involved too important to engage in ex post facto inquiries into financial ability when there is any doubt at all on that score." 384 U.S. at 473, n. 43.

Petitioner submits that said footnote has been misinterpreted by the Tennessee courts and improperly implied. The *Miranda* warnings were made a prerequisite to interrogation in order to get away from the various subjective criteria previously used to determine whether or not a suspect had waived his Fifth Amendment rights.

The Tennessee courts, as in the present case, have been holding that if a person is not indigent, learned by virtue of his testimony at trial or by virtue of his ultimately having retained counsel, then the warning concerning appointed counsel is inapplicable. However, it should be noted that *Miranda* states that the warning need not be given if it is ***known*** that the person is not indigent and that ex post facto determination should not be proper.

If the *Miranda* warnings are to be required at all, Petitioner submits that they should be required in all cases. To do otherwise would be to nullify the whole point of the warnings requirement. To make an after the fact consideration of the financial resources of an accused would require making subjective findings which *Miranda* wanted to abolish.

Since the statements obtained in violation of *Miranda* led directly to the apartment and the subsequent confiscation of the money and Marihuana, such items should have been excluded as evidence. *Wong Sun v. United States*, *supra*; *Brown v. Illinois*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT W. RITCHIE

JOSEPH M. TIPTON

Attorneys for Petitioner

Of Counsel:

RITCHIE & TIPTON,
1130 Park National Bank Building,
Knoxville, Tennessee.

CERTIFICATE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari on behalf of the Petitioner, John Nix, has been forwarded, by first class mail, to the Honorable R. A. Ashley, Jr., Attorney General of the State of Tennessee, Supreme Court Building, Nashville, Tennessee 37215.

This day of August, 1975.

ROBERT W. RITCHIE

APPENDIX A

IN THE SUPREME COURT OF TENNESSEE AT KNOXVILLE

JOHN NIX
Petitioner,
v.
STATE OF TENNESSEE
Respondent.

Knox Criminal
No. 298

IN RE: PETITION FOR WRIT OF CERTIORARI OF JOHN NIX

Upon consideration of the petition, briefs, and the entire record in the cause, it is the judgment of this Court that the Court of Criminal Appeals has correctly dealt with the issues.

The writ is denied.

PER CURIAM

APPENDIX B

[fol. 1]

THE COURT OF CRIMINAL APPEALS OF TENNESSEE
KNOXVILLE, MAY 1974 TERM

JOHN NIX
Plaintiff in Error

v.

STATE OF TENNESSEE
Defendant in Error

NO. 298
Knox County

Honorable Richard R. Ford, Judge

(Possessing more than 1/2 ounce of marijuana)

For Plaintiff in Error:

Robert W. Ritchie
Joseph M. Tipton
Knoxville, Tennessee
(Retained)

For Defendant in Error:

Milton P. Rice
Attorney General of
Tennessee

David L. Raybin
Assistant Attorney General
Nashville, Tennessee

Ronald A. Webster
District Attorney General
Knoxville, Tennessee

OPINION

Represented by retained counsel, Nix was convicted of possessing more than one-half ounce of marijuana with the intent to sell it, for which he was sentenced to imprisonment in the penitentiary for not less than one nor more than five years and to pay a fine of $3,000. (TCA §52-1422, Schedule VI; TCA §52-1432(a)(1)(F). He has perfected an appeal in the nature of a writ or error to this Court.

We address first the defendant's second, third, fourth and fifth Assignments of Error which, collectively, charge that he was illegally arrested without probable cause, that he was interrogated without being advised of his constitutional rights, and that the trial court erred in failing to suppress the defendant's pre-trial custodial statements and evidence obtained by a warrantless search of his apartment to which he did not freely and voluntarily consent. All of these questions were properly raised by defense motions to suppress evidence, which were heard and overruled by the trial court before selection of the jury.

We summarize the material evidence adduced in the suppression hearing, which consumed two days and occupies 292 pages of this record. It was developed that information reached the Knoxville FBI office that a young white man driving a blue Volkswagen bus, bearing Texas license plates, had exchanged a number of small denomination bills for larger bills at several banks; and that about 2:00 p.m. on February 1, 1973, as the defendant parked his Volkswagen bus on the University of Tennessee campus, three FBI agents approached the bus on the driver's side and identified themselves to the defendant.

[fol. 2] FBI Agent Phillips testified that the defendant was not placed under arrest; that he was advised of all of his *Miranda* rights with the exception of the right to have the court appoint a lawyer for him if he could not afford one; that he was asked to sit in the FBI car (it was raining slightly) and talk with them about the money; that in the car the defendant explained that he had won the money gambling and felt he would have a better chance to exchange it for larger bills if he went to several banks rather than just one; that he did not reply when asked why he did not do that at the place he won the money gambling; that he said some of the money was in his apartment; that he told the agents he was a senior at UT majoring in psychology, and that he had been dropped from the football squad because he admitted to Coach Battle that he had smoked marijuana; that he was then asked whether he had any contraband or any illegal narcotics at his residence, and he replied he only had a margarine butter dish of marijuana for his personal use, and said he also had there a .22 caliber derringer; that the agents explained to him they would like to check the serial numbers on the bills and asked him if he would consent to a search of his apartment and he agreed; that, after dismissing the defendant's wife to go to her classes at the university, they went to the defendant's apartment, the defendant driving his bus and accompanied by one agent and the other two agents following in the FBI car; that enroute to the apartment, the defendant stopped at a filling station and bought gasoline, and that he was under no restraint and was not under arrest or being held in custody; that it is FBI procedure to always place a suspect in handcuffs after arresting him, and that the defendant was never handcuffed or searched or restrained in any way by the FBI agents and he was never arrested by any of them; that when they got to the

[fol. 3] apartment and entered the living room Agent Phillips read to the defendant a consent-to-search form and asked him to sign it, and the defendant read the form himself and inquired what would happen if he did not sign it and Agent Phillips replied that a request would be made for a search warrant; that the defendant asked the agents to step outside for a few minutes and when he was told they could not do so he signed the form; that the agents then asked him for the marijuana and he produced a very small amount of it which he said was for his own use, and he showed them where the derringer was when they asked about it; and that when they asked him for the money he produced it and counted it in their presence, the aggregate amount being $9290.

While they were counting the money, Knoxville Police Officers arrived. Agent Phillips explained to them what had happened and showed them the consent-to-search form signed by the defendant. Lieutenant Norman, of the Knoxville Police Department Narcotics Division, testified they were there as a result of a call from their dispatcher to meet the FBI at the apartment; that he shook hands with the defendant and advised him orally of his rights and asked him if the narcotics division officers could search his apartment and the defendant agreed; that during the search eight one-pound bricks of marijuana were found; that the defendant was under no restraint until he was taken into custody and placed in the police car; and that he was again advised of his rights enroute to the police station.

The defendant testified in the suppression hearing that he spent the morning of February 1, 1973 going to several Knoxville branch banks exchanging small bills for larger ones, and then he and his wife started to their classes at

UT; that the FBI agents identified themselves but did not inform him of his rights and asked him a few
[fol. 4] questions about changing the money; that they told him to get in the FBI car and he did so, but was not threatened or forced, and they still did not advise him of his rights; that they told him they wanted to see the money and said nothing about wanting to search his apartment; that one of the agents went with him when he went back to his bus to talk to his wife, and then she was released to go to her classes; that he drove his bus to his apartment with one agent accompanying him and the others following in the FBI car; that when they reached the apartment he asked the agents if they wanted to see the money, and Agent Phillips presented a consent-to-search form and said they would like for him to sign it, and he read it over and told them he wasn't going to sign anything like that; that they told him he would have to sign the form, and that they could get a search warrant by simply making a telephone call; that when he asked the agents to step outside they laughed at him and told him they could not do so, and laughed again and told him to sign the form when he asked them if they were not going to leave, and that he then signed the form, feeling that he had no other choice although he realized the document stated he could refuse to permit a search; that the agents then asked to see the marijuana and the gun and the money; that he was a psychology major at the university at the time; that he turned over the money, $9290, to the FBI and that this money was his and he had other funds at his disposal and he was not indigent and had hired his attorney; that he lied to the agents when he told them he won that money gambling; that as he and the agents went to his apartment it was on his mind that he had marijuana and $9290 there and that he had acquired that money by selling marijuana, and the

reason he wanted the officers to leave before he
[fol. 5] signed the consent form was that he did not want them to find the money and marijuana; that the marijuana found in his apartment was his; and that the FBI agents never informed him that he was under arrent or told him he could not go outside if he wanted to and permitted him to use the telephone, and the bathroom with the door open; that the agents told him he was only making trouble and he would be bringing his wife into the trouble if he did not cooperate; and that when the Knoxville Police arrived he did not consent to their searching his apartment and the first time he was advised of his rights was enroute to the city jail in the police car.

A clinical psychologist testified as a defense witness that he found the defendant to be passive, introverted and indecisive and that he would tend to give in easily in a crisis situation and to become flustered and easily intimidated before authority figures.

At the conclusion of the suppression hearing, the trial judge carefully reviewed the testimony and found as fact (1) that the defendant was never arrested by the FBI agents, although they had probable cause for doing so, and (2) that the defendant was an intelligent and educated young man and understandingly and voluntarily signed the consent form and consented to the search of his apartment. Accordingly, the court overruled the motion to suppress "as to each and every ground."

We are bound to adhere to the settled rule that the findings of the trial court, upon questions of fact, are conclusive unless this Court finds that the evidence preponderates against the lower court's judgment. ***Bratton v. State***, ___ Tenn. Crim. App. ___, 477 S.W.2d 754. The Supreme

Court of this State has held repeatedly that the
[fol. 6] findings of a trial judge in an oral hearing, after seeing and hearing the witnesses testify and hearing and considering conflicting testimony, will be given the weight of a jury verdict. *Taylor v. State*, 180 Tenn. (?, 171 S.W.2d 403; *Atlas Powder Company v. Leister*, 197 Tenn. 491, 274 S.W.2d 364; *Bratton v. State*, *supra*. This record fully sustains the trial judge's finding that the defendant knowingly and voluntarily consented to the search of his apartment.

"All of the authorities agree a defendant may waive his rights relative to searches and seizures under the Constitution of the United States and Tennessee. The question of whether or not there was such a waiver and consent to the search is one for the Trial Judge in the first instance." *Shafer v. State*, 214 Tenn. 416, 425, 381 S.W.2d 254.

With respect to the failure of the FBI agent to advise the defendant of his right to have an attorney appointed to represent him if he could not afford to hire one, it is sufficient to say that only an indigent must be advised of the right to appointed counsel. *Carter v. State*, 1 Tenn. Crim.App. 545, 447 S.W.2d 115; *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, Note 43. As above noted, by his own testimony at the suppression hearing the defendant testified that he was not indigent.

The defendant's first Assignment of Error relates to the trial before the jury and, in essence, assails his conviction upon the usual ground that the evidence preponderates against the verdict and in favor of his innocence. This Assignment and Assignments six, seven, eight, nine and ten all relate to his contention that the State failed to prove the marijuana confiscated in his apartment was the species

cannabis sativa L which was outlawed by the statute at that time. His claim is that there are three species
[fol. 7] of the genus cannabis and that it was impossible for anyone to tell to which of the three species (one of which is sativa L) the marijuana in his apartment belonged.

In his opening statement before the jury, the defense counsel admitted "that John Nix did possess a substance which the State alleges is marijuana," and stated the defendant's theory to be that, in addition to the statutory definition of marijuana as cannabis sativa L, there is another species known as cannabis indica and a third one known as cannabis ruderalis, and that a toxicologist being a chemist is not qualified to distinguish between the three different species, "And that therefore, there must be a reasonable doubt as to whether or not the substance introduced in this case is in fact cannabis sativa L."

In the trial before the jury, the testimony of FBI Agent Phillips and Knoxville Police Lieutenant Norman was substantially the same as they gave in the suppression hearing. Of course, since the defendant elected not to testify before the jury, the State made no attempt to refer to or admit statements he made in his own testimony during the suppression hearing.

The defendant complains specifically that the trial court erroneously and prejudicially denied him the right to examine John Barbara as to whether he was qualified as an expert witness with reference to the plant cannabis. The significance attached by the defendant to the point thus raised is that at the time of his indictment and trial TCA §52-1409(n) provided in pertinent part: "Marijuana' means all parts of the plant cannabis sativa L. . .," and

that actually there are three species of the genus cannabis, and that in order to convict him it was incumbent upon the State to prove beyond a reasonable doubt that the substance he possessed was cannabis sativa L and that the State failed to do so.

[fol. 8]

Although irrelevant to the case at hand, it is noted that subsequent to the defendant's trial the words "sativa L" were deleted from the statutory definition of marijuana by Chapter 741 of the Acts of 1974, which became effective on 5 April 1974.

When Mr. Barbara was called by the State as an expert witness, defense counsel raised a question as to his qualifications as such. After extended examination and 11 pages of cross-examination, in the course of which he detailed his education and training and experience as a toxicologist and his occupation as technical director of Tennessee's Region III Forensic Science Laboratory, his training and experience in the analysis of various drugs including marijuana and LSD, and his experience in some 2,000 to 3,000 toxicological examinations of various substances and his testimony in court in more than 100 cases as an expert witness in the field of toxicology and identification of substances, the court found that he was an expert witness and so instructed the jury. The question of the competency and qualification of witnesses is to be determined by the trial court. *Harris v. State*, 3 Tenn.Crim.App. 64, 457 S.W.2d 370.

Mr. Barbara received the confiscated marijuana for toxicological analysis. He testified that the material tested positive for the presence of tetra hydrocannabinol, a chemical compound commonly referred to as THC, which he stated is found only in cannabis sativa L. He testified also that,

[fol. 9]

although he has never studied the botanical classification of the genus cannabis himself, he knows of no other species of this genus than sativa L, and that in his studies and experience he has never heard any convincing or authoritative evidence that there is more than the one species of cannabis, and that the literature of the Bureau of Narcotics and Dangerous Drugs and all the information he had received from the government show only the one species——cannabis sativa L.

Barbara said on cross-examination (which fills an additional 23 pages of the trial record) that he is a chemist and not an expert in botany; that sativa L is a botanical name given to the plant by a taxonomist in the Eighteenth Century; that he is not qualified to classify plants botanically; that sativa L is the species of the genus cannabis, which belongs to the family Cannabinaceae and he knows of no other species of cannabis, but has not made a study as to whether there is more than one species; that he is not familiar with the book *Flora Europaea* nor with a treatise entitled *Flora U.S.S.R.* He had read the chapter on cannabis in Harvard botany professor Dr. Richard E. Schultes' book entitled *The Botany and Chemistry of Hallucinogens*, and said that was the only place he had ever seen a statement in print that there is more than one species of marijuana or cannabis. Asked whether he recognized Dr. Schultes as an expert in the field of botany, he said: "Well, as a chemist, I could not recognize someone in another profession." On re-direct examination he testified that his sources of information define *cannabis ruderalis* and *cannabis indica*, mentioned in Dr. Schultes' book, as sub-divisions or varieties of sativa L.

[fol. 10] During the trial the court permitted the sworn testimony of defense witness Dr. William McKinley Klein, Jr. to be tape-recorded by the official court reporter in the presence of the court and counsel, and permitted that recording to be played before the jury. Dr. Klein, a taxonomist and assistant director of the Missouri Botanical Garden, gave an extended discussion of the science of taxonomy, stating that essentially a taxonomist is engaged in the botanical identification and classification of plants. He testified that taxonomists are the only persons capable of classifying plants according to genus and species, and that toxicologists are not qualified to do so; that the genus cannabis is polytypic, which means it has more than one species, and that the three species of cannabis are (1) cannabis sativa L, classified in 1753, (2) cannabis indica, classified in 1783, and (3) cannabis ruderalis, classified in 1924; that the latter two species were of Asiatic and European origin, respectively, and had not met with intensive research or notice in this country until the last few years; that "insofar as we know" each of the three species contains the chemical compound tetra hydrocannabinol and that, therefore, a chemical test could not differentiate the three species; that he could not determine the species of the cannabis confiscated and admitted in evidence in this case, because of its processed condition. He admitted that some treatments of this subject had listed sannabis indica and cannabis ruderalis as sub-species of cannabis sativa L. He also admitted that there was at the moment a difference of opinion in the discipline as a whole as to this question, but said those who have done recent research support the polytypic view. He also said that some of each of the three species may not show the presence of tetra hydrocannabinol under certain conditions, such as the place of growth, the type

of soil, the amount of rainfall, etc. During [fol. 11] direct examination by defense counsel he identified *The Botany and Chemistry of Hallucinogens* and said the authors are considered reputable authorities in that field. The court sustained the State's objection when defense counsel moved to admit the book in evidence for use in cross-examination. In cross-examination, the Assistant District Attorney General called to Dr. Klein's attention the same book and read statements therein and asked whether he agreed and Dr. Klein then read another statement in it.

Dr. Aaron J. Sharp, a defense witness who is a botany professor at the University of Tennessee and specializes in plant taxonomy, testified that according to his research there were two or three species of the genus cannabis in the United States, and that they cannot be differentiated by chemical tests, and that taxonomists are the only people who can do so, and that in its present condition he could not be sure that the confiscated material was cannabis and it would be impossible to say what species it was. Dr. Sharp testified on direct examination that Dr. Schultes' book ". . .is a top book as is Dr. Schultes a top man in this field in the United States," and that he had read the portion dealing with cannabis. When defense counsel asked Dr. Sharp to read two paragraphs from the book, to impeach Mr. Barbara, the trial court sustained the State's objection. When Dr. Sharp identified *Flora Europaea* as an authoritative work in the field of plant taxonomy and said he knew the authors and was asked and stated that this book shows two species of cannabis that occur in Europe, the State's objection that this was hearsay was sustained and the jury was instructed to disregard the witness' statements as to what the book said.

[fol. 12] The weight and value of expert testimony is for the jury and must be received with caution. *Mullendore v. State*, 183 Tenn. 53, 191 S.W.2d 149; *Sparkman v. State* (Tenn.Crim.App.), 469 S.W.2d 692.

As the sole and exclusive judges of the evidence and of the credibility of the witnesses and the weight and value to be given to the swearing of each and every witness in the case, *Gordon v. State* (Tenn.Crim.App.), 478 S.W. 2d 911; *Bailey v. State* (Tenn.Crim.App.), 479 S.W.2d 829, the jury accredited full credence to the testimony of Mr. Barbara that the marijuana admittedly possessed by the defendant was the type proscribed at the time by TCA §52-1409(n)— cannabis sativa L. That settled the matter under the established rules governing appellate review of the evidence in criminal cases when its sufficiency is challenged on appeal. *Webster v. State*, 1 Tenn.Crim. App. 1, 425 S.W.2d 799; *McGill v. State*, 4 Tenn.Crim, App. 710, 475 S.W.2d 223.

There is no merit in the defendant's complaint that the trial judge sustained the State's objection to a hypothetical question posed to Mr. Barbara as to whether the chemical compound THC was present in any other plant. The court properly sustained objection to that question, for the simple reason that at the time there was no evidence in the record that this substance may be found in any other plant. Hypothetical questions may not be based upon assumed facts not in evidence. *Bailey v. State*, *supra*.

We also find, in the total context of this record, that the trial court did not err in disallowing the defendant's witnesses Klein and Sharp to put into evidence certain portions of the scientific works hereinabove mentioned,

[fol. 13] for the purpose of undertaking to impeach the State's witness Barbara simply because he testified he was unfamiliar with two of the books and that, as a chemist, he could not recognize the other book (*The Botany and Chemistry of Hallucinogens*) because the author was a member of a different profession. And the court was not in error in declining to admit the books in evidence. When Mr. Barbara testified on cross-examination with reference to the three scientific works as above indicated, defense counsel made no effort to impeach him by *having him read or by reading to him from those treatises.*

The rules with respect to the use and admission of books and scientific treatises is well settled in this State. In *Byers v. Railroad*, 94 Tenn. 345, 29 S.W. 128, our Supreme Court said in 1895:

". . . When a witness is testifying as an expert, it is competent to test his knowledge and accuracy, upon cross-examination, by reading to him or having him read extracts from standard authorities upon the subject-matter involved, and then asking him whether he agreed or disagreed with the authorities, and comparing his opinion with those of the writer. Hess v. Lowery, 7 L.F.A., 90; 89 Cal., 399; 48 A. & E. R.R. Cases, 111; 1 Greenleaf on Evidence, Sec. 440, note (15th Ed.).

* * *

"See 1 Greenleaf on Evidence (15th Ed.), Sec. 440, note E, in which the following propositions are laid down and cases cited in support: '*The weight of current authority is decidedly against the admission of scientific books in evidence before a jury and allowing such books to be read from to contradict an expert generally.*

However, it is a proper method of cross-examination, in order to test the learning of a witness who testifies as an expert, to refer to books of approved authority upon the subject under investigation and question him in regard thereto. Scientific books may be used by the attorney in framing his questions for the witness. He may read the questions from such a book to the witness, either on direct of cross-examination. Thompkins v. West, 56 Conn., 485. And if an expert has quoted a book, it may be read to him to show that he has misquoted it. Underhill on Evidence, Sec. 189; Rippon v. Bittel, 30 Wis., 614.'" (Emphasis supplied)

[fol. 14] In *McCay v. Mitchell*, 62 Tenn.App. 424, 444, 463 S.W.2d 710, the Court Said:

"It is established in Tennessee *an expert witness may be cross-examined by the use of standard authorities on the subject.* The Court in Sale v. Eichberg (1900) 105 Tenn. 333, 59 S.W. 1020, cited Byers v. Nashville, C. & St. L. Railroad Co., 94 Tenn. 345, 29 S.W. 128, which states: *'When a witness is testifying as an expert, it is competent to test his knowledge and accuracy upon cross-examination by reading to him, or having him read, extracts from standard authorities upon the subject-matter involved,* and then asking him whether he agreed or disagreed with the authorities, and comparing his opinion with those of the writer.'" (Emphasis supplied)

And the Court of Appeals of this State said in *Standard Life Insurance Company v. Strong*, 19 Tenn.App. 404, 424, 89 S.W.2d 367:

"'According to the clear weight of present authority, scientific books and treatises cannot be received as evidence of the matters or opinions which they contain.' Jones on Evidence (2 Ed.), vol. 4, sec. 1741, p. 3189."

Finally, contrary to the defendant's additional insistence, for the same reasons the trial judge committed no error in declining the request to take judicial notice of United States Code §209, which lists cannabis indica as one of many proscribed poisons. Obviously that federal statute could not impeach Mr. Barbara. See also: TCA §24-610, with which the defendant did not comply.

Affirmed.

/s/ J. Wayne Oliver
W. Wayne Oliver
Judge

Concur:

Charles Galbreath
Judge

/s/ Robert K. Dwyer
Robert K. Dwyer
Judge

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

May 1974 Session

[fol. 1]

JOHN NIX,
Plaintiff in Error

v.

STATE OF TENNESSEE,
Defendant in Error

No. 298
Knox County

Hon. **Richard R. Ford**, Judge

(Possessing more than 1/2 Ounce of Marijuana)

DISSENTING OPINION

There can be little doubt that the defendant was under arrest and in custody of the F.B.I. when devastatingly damaging admissions were obtained from him and a search conducted of his apartment. As summarized in the majority opinion, Agent Phillips admits that the defendant while in his own apartment "asked the agents to step outside a few minutes." The agent testitifed, incredibly, that he advised the defendant that they could not do so. In later testimony, Agent Phillips admits that the reason the defendant was not left alone as he requested was because they feared "he had something he wanted to dispose of and he just wanted us to step outside a minute or two for this to be accomplished."

When the agents for the F.B.I. refused to permit the defendant his freedom to the privacy of his home, he was in every sense of the word "under arrest." Under a somewhat similar factual situation in which a suspect was

[fol. 2] closely guarded and refused permission to leave the presence of federal officers during a search, it was logically concluded by the Court that such "restraint . . . and restriction of . . . liberty of movement constituted an arrest." *United States v. Hooper*, 320 F.Supp. 507. Our Supreme Court has long recognized this principle of law:

> It is well settled by the law of arrest that it is not necessary to effect an arrest that there be a manual touching of the body or a formal declaration of arrest; it is sufficient if the person arrested understands that he is in the power of the one arresting and submits in consequence. 4 Am. Jur., Sec. 2, pp. 5, 6; *Robertson v. State*, 184 Tenn. 277, 284, 198 S.W.2d 633. There are numerous cases holding that "requisite control may be assumed without force, or without any visible physical restraint." 6 C.J.S., Arrest, Sec. 1, p. 571.
>
> *Murphy v. State*, 194 Tenn. 698

It is not surprising that the defendant was under close arrest and supervision by the F.B.I. agents. They had a lawful right, as well as a duty, to arrest him, having more than probable cause to believe he had committed the felony for which he now stands convicted. The only problem is that at that time and during the subsequent events when the agents asked the defendant to show them the drugs he produced at their direction, he had not been advised by them of his basic rights. After detailing the advice given the defendant, which did not include his right to have counsel appointed for him, Agent Phillips testified that no further advice was given up to and including the time the damaging admissions against interests were made.

[fol. 3] It is quite clear, in spite of the F.B.I. agent's assertion to the contrary, that the defendant, as a matter of fact, was in custody. Counsel for the State relied during the hearing to suppress on the agent's assertion that no arrest had taken place to excuse the failure to adequately warn the defendant of his *Miranda* rights. Inasmuch as arrest *had* occurred, the failure to give the warnings was fatal error.

> In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one.
>
> *Miranda v. State of Arizona*, 86 S.Ct. 1602 (1966)

Even had the warnings given the defendant at a time when the finger of accusation was unerringly pointed directly at him been full and complete, at the moment the defendant asked the F.B.I. agents to cease and desist in their subtle intimidation by leaving his home this request canceled all consent to further interrogation. For:

> If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.
>
> *Miranda v. State of Arizona, supra.*

In *Martin v. State*, 440 S.W.2d 624, 1 Tenn.Crim. Apps. 282, the arresting officer gave the same limited advice as did Agent Phillips in this case. In reversing a conviction obtained by the use of incriminating [fol. 4] admissions made by the defendant, Judge W. Wayne Oliver recounted the circumstances and reached the proper conclusion of law in his opinion:

> In the presence of the jury, the . . . officer testified:
>
> "Q State to the Court and jury just what you told him.
>
> A We advised him that he could remain silent, he didn't have to make a statement. That any statement that he made could be used in a Court of law, we advised him that he could get an attorney, or talk to his attorney, or either get him an attorney."
>
> He then related to the jury the oral incriminating statement made by the defendant in which he related some of the inculpatory details of the fatal encounter.
>
> Unquestionably, the trial judge committed prejudicial error in holding that the defendant was adequately advised of his constitutional rights by the arresting officer prior to interrogating him, and in admitting the defendant's oral statements made to that officer during that in-custody interrogation.
>
> *Martin v. State, supra.*

Dissenting Opinion

Perhaps it is time to retreat from relatively recent defined principles heretofore considered binding on arresting officers and the courts of this State and Nation. But unless we are in a position to overrule the United States Supreme Court's holding in the landmark case of *Miranda v. State of Arizona*, *supra*, and such opinions as *Martin v. State*, *supra*, applying these principles in Tennessee, this conviction cannot stand.

In the present status of the law, I am compelled to respectfully dissent from the majority opinion.

/s/ Charles Galbreath
CHARLES GALBREATH, Judge